

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: No. 10-03035 CW
VICKI TRAN, ORDER AFFIRMING
Appellant. DECISION AND
ORDER OF
BANKRUPTCY COURT

Appellant Vicki Tran, debtor in the underlying Chapter 13 bankruptcy case, files a limited appeal of the bankruptcy court's June 25, 2010 ruling dismissing her case based on bad faith. Appellee Martha G. Bronitsky, Chapter 13 Standing Trustee, argues that the bankruptcy court's Memorandum of Decision and Order of Dismissal should be affirmed. Appellant has filed a reply.¹ Having considered all of the papers filed by the parties, the Court AFFIRMS the order of the bankruptcy court.

BACKGROUND

On March 3, 2009, Appellant filed for Chapter 7 bankruptcy relief in the United States Bankruptcy Court for the Northern District of California. On June 2, 2009, Appellant received a

¹The Court's December 13, 2010 Order Establishing New Briefing Schedule required Appellant to file her reply within fourteen days after service of Appellee's brief. Appellant filed her reply forty-four days after Appellee filed her brief. In the interests of justice, the Court will consider the late-filed reply.

1 general discharge in that case. On January 17, 2010, Appellant
2 filed for Chapter 13 bankruptcy relief in the same bankruptcy
3 court.

4 Appellant's bankruptcy schedules show that, at the time she
5 filed her Chapter 13 petition, she had no general unsecured debts
6 and no priority debts. She owned a residence in Newark, California
7 valued at \$434,000 which was subject to a first deed of trust in
8 favor of Washington Mutual Bank (WAMU) securing a debt in the
9 amount of \$459,991, and a second deed of trust in favor of WAMU
10 securing a debt in the amount of \$80,900. As of the date of the
11 petition, the first deed of trust was under-secured by \$25,991 and
12 the second deed of trust was wholly unsecured. Appellant also
13 owned another parcel of real property in San Jose, California that
14 was over-encumbered, and a motor vehicle valued at \$13,000 subject
15 to a security interest that secured a debt in the amount of \$6,000.

16 On February 16, 2010, Appellant filed a Chapter 13 Plan and,
17 on June 8, 2010, she filed a First Amended Chapter 13 Plan.
18 Appellant listed the following creditors as holding secured claims:
19 WAMU for two delinquent payments on the first mortgage on her
20 residence, the Alameda County Tax Collector for delinquent property
21 taxes on her residence, and VW Credit for the \$6,000 loan on her
22 vehicle. The plan proposed that Appellant would make sixty monthly
23 payments of \$375, which would cure the two delinquent payments on
24 the first deed of trust, cure the delinquent real property taxes
25 and pay the fees of the Chapter 13 Trustee and Appellant's counsel.
26 No payments would be made to general unsecured creditors. In an
27 attachment to the plan, Appellant stated that she would file a
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1 motion to strip² the second lien on her principal residence and re-
2 classify it as an unsecured non-priority claim. Appellant filed
3 such a motion and, on June 8, 2010, obtained an order valuing the
4 second lien as wholly unsecured. Appellee's Appendix (App.), Ex.
5 6.

6 On April 7, 2010, the Chapter 13 Trustee objected to
7 Appellant's plan on the ground that it was improper to strip a
8 wholly unsecured junior lien when Appellant was not eligible for a
9 discharge.³ Appellant filed an opposition and, on June 14, 2010,
10 the bankruptcy court held a hearing on the Chapter 13 Trustee's
11 objection to confirmation.

12 At the confirmation hearing, the following colloquy took place
13 between the bankruptcy court and Appellant's attorney:

14 Court: Apart from the lien-strip issue, is there any
15 purpose to this Chapter 13 other than just stripping
off the lien?

16 Atty: The petition was filed to, at the time, stop--the
17 Debtor also owned a condominium, and that was set
for Trustee's sale. The Debtor has since decided
18 not to retain that property.

19 Court: So, why are we here other than just to lien-strip?

20 Atty: The primary focus is a lien strip, Your Honor. That
is correct.

21 Court: So isn't this just subverting Chapter 7? I mean, in

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23 ²As explained below, 11 U.S.C. § 506(d) allows a secured claim
to be "stripped" of its status as a secured claim to the extent
24 that the amount of the claim exceeds the value of the property to
which it attaches plus the amount of any senior liens.

25 ³Appellant conceded in the Chapter 13 bankruptcy proceedings
26 and in this appeal that, because she filed her Chapter 13 petition
less than four years after receiving her discharge in the prior
27 Chapter 7 case, she is not eligible for a discharge in her Chapter
13 case pursuant to 11 U.S.C. § 1328(f)(1).

Chapter 7, the Debtor couldn't strip off the lien. So, isn't this just a disguised 7, the purpose of which is to avoid the Dewsnup holding?

Atty: That's not my position, Your Honor. I mean, the Debtor --

Court: I know it's not your position, but tell me why this isn't just a Chapter 7 case with a lien-strip opportunity, from the Debtor's standpoint.

Atty: Well, Your Honor, the Debtor could have filed a Chapter 13 and made a zero percent distribution to unsecured creditors and had the same result.

Court: No. I would--I mean, if the only reason for a 13 is to lien-strip off a lien, I've held that it's not a valid 13. I mean, unsecureds getting nothing, no assets to save, just want to be in 13 to avoid Dewsnup. All right.

Atty: Okay.

Court: All right. Anything else?

Trustee: No, Your Honor.

Atty: No, Your Honor.

Court: All right. I'll take this under submission, but probably the likely holding is to deny confirmation of this plan.

Transcript of June 14, 2010 Hearing (TR) at 5-6.

In the bankruptcy court's June 25, 2010 Memorandum of Decision, it overruled the Chapter 13 Trustee's objection, but dismissed Appellant's case pursuant to 11 U.S.C. § 1307(c) on the grounds that the case was filed in bad faith. On the same date, the bankruptcy court filed an order dismissing Appellant's case.

Appellant filed a timely notice of appeal, objecting on the following grounds to the dismissal of her case: (1) she was not provided notice or an opportunity for a hearing on the issue of bad faith because it was not the basis of the Chapter 13 Trustee's

1 objection and was not before the bankruptcy court at the June 14,
2 2010 confirmation hearing; and (2) had a bad faith objection
3 properly been before the bankruptcy court, she would have presented
4 significant evidence establishing that she had filed her plan in
5 good faith and was entitled to strip an unsecured lien. The
6 Chapter 13 Trustee filed a responsive brief in which she argues
7 that (1) the bankruptcy court had authority to dismiss the case for
8 bad faith even though there was no objection or motion addressing
9 that issue and (2) the bankruptcy court's dismissal based on bad
10 faith should be affirmed because Appellant had no legitimate
11 Chapter 13 purpose. The Chapter 13 Trustee does not appeal the
12 bankruptcy court's decision to overrule her objection that
13 Appellant cannot strip an unsecured junior lien because she is not
14 eligible for a discharge.

15 JURISDICTION AND STANDARD OF REVIEW

16 The district court has jurisdiction over this appeal under 28
17 U.S.C. § 158(a). The district court reviews the bankruptcy court's
18 conclusions of law de novo and its findings of fact under the
19 clearly erroneous standard. Fed. R. Bankr. 8013; In re Wagner, 839
20 F.2d 533, 536 (9th Cir. 1988).

21 DISCUSSION

22 I. Bankruptcy Court's Sua Sponte Dismissal

23 At the June 14, 2010 hearing, the bankruptcy court indicated
24 that it was concerned that Appellant's Chapter 13 case was "not
25 valid" because its purpose was solely to strip the junior lien.
26 See TR at 6. Despite this notice of the bankruptcy court's concern
27 about the bad faith of Appellant's case, she did not seek to
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1 present any further evidence or argument on this issue. Therefore,
2 Appellant received notice and had an opportunity to respond.

3 Furthermore, bankruptcy courts have an obligation, regardless
4 of whether there is an objection, to ensure that all requirements
5 of 11 U.S.C. § 1325(a) are fulfilled before confirming a Chapter 13
6 plan. Espinosa v. United Student Aid Funds, Inc., 130 S. Ct. 1367,
7 1380-81 (2010) (failure to comply with Bankruptcy Code's
8 requirement for Chapter 13 plan prevents confirmation, even if
9 creditor fails to object). Also, under 11 U.S.C. § 105(a), a
10 bankruptcy court is empowered sua sponte to issue any order or
11 judgment that is necessary to carry out the provisions of the
12 Bankruptcy Code, including dismissing a case. In re Tenant, 318
13 B.R. 860, 869 (9th Cir. B.A.P. 2004) ("Section 105(a) makes
14 'crystal clear' the court's power to act sua sponte where no party
15 in interest or the United States trustee has filed a motion to
16 dismiss a bankruptcy case.").

17 Accordingly, the bankruptcy court was empowered to dismiss
18 Appellant's case sua sponte for failure to comply with the
19 Bankruptcy Code.

20 II. Legitimate Chapter 13 Purpose

21 A. Good Faith Requirement

22 Chapter 13 was enacted to enable debtors to develop and
23 perform under a plan for the repayment of debts over a period of
24 time. In re Warren, 89 B.R. 87, 92 (9th Cir. B.A.P. 1988).
25 Developing a repayment plan under Chapter 13, as opposed to
26 liquidating all assets under Chapter 7, permits debtors to protect
27 their assets. Id. Chapter 13 provides a broader discharge than
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1 does Chapter 7, premised upon the willingness of the debtor to
2 repay at least some portion of his or her debts. Id.

3 Under 11 U.S.C. § 1325(a)(3) and (7), a Chapter 13 plan may be
4 confirmed only if it has been proposed in good faith. Good faith
5 is a discrete and paramount test which must be passed before the
6 debtor's plan may proceed to confirmation. Id. at 94. Under 11
7 U.S.C. § 1307(c), the court may dismiss a case for "cause," which
8 includes bad faith. In re Eisen, 14 F.3d 469, 470 (9th Cir. 1994).
9 Bad faith is determined by the totality of the circumstances. Id.
10 This includes: (1) whether the debtor misrepresented facts in the
11 petition or plan, unfairly manipulated the Bankruptcy Code, or
12 otherwise filed the petition or plan in an inequitable manner;
13 (2) the debtor's history of filings and dismissals; and
14 (3) egregious behavior. In re Leavitt, 171 F.3d 1219, 1224 (9th
15 Cir. 1999). Other factors to consider are (1) the amount of the
16 proposed payments and the amount of the debtor's surplus; (2) the
17 debtor's employment history, ability to earn, and likelihood of
18 future increases in income; (3) the probable duration of the plan;
19 (4) the extent of preferential treatment between classes of
20 creditors; (5) the type of debt to be discharged and whether such
21 debt is nondischargeable in Chapter 7; (6) special circumstances
22 such as inordinate medical expenses; (7) the extent to which
23 secured claims are modified; (8) the motivation and sincerity of
24 the debtor in seeking Chapter 13 relief; and (9) the burden the
25 plan's administration would place on the Chapter 13 trustee.
26 Warren, 89 B.R. at 93.

27 Because Chapter 13 was enacted to provide an incentive for the
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1 debtor to commit to a repayment plan as an alternative to
2 liquidation under Chapter 7, a court should not confirm a Chapter
3 13 plan that is, in essence, a veiled Chapter 7 case. Id. at 95.
4 Nominal repayment is evidence that the debtor is unfairly
5 manipulating Chapter 13 and, thus, acting in bad faith. In re
6 Goeb, 675 F.2d 1386, 1391 (9th Cir. 1982).

7 B. Lien-Stripping

8 In bankruptcy, title 11 U.S.C. § 506(a) provides:

9 An allowed claim of a creditor secured by a lien on
10 property in which the estate has an interest . . . is a
11 secured claim to the extent of the value of such
12 creditor's interest . . . and is an unsecured claim to
the extent that the value of such creditor's interest
. . . is less than the amount of such allowed claim . . .

13 Thus, the claim's status as secured and the amount of the
14 secured claim depends upon the value of the property to which the
15 lien attaches, and the amount of any senior liens. If a lien does
16 not attach to any value, it is void by operation of 11 U.S.C.
17 § 506(d) ("To the extent that a lien secures a claim against the
18 debtor that is not an allowed secured claim, such lien is void").
19 However, in a Chapter 7 case, a debtor may not void all or any
20 portion of a lien on real property under 11 U.S.C. § 506(d), even
21 if it is partially or wholly unsecured. Dewsnup v. Timm, 502 U.S.
22 410, 417 (1992). Dewsnup is inapplicable in Chapter 13 cases. In
23 re Enewally, 368 F.3d 1165, 1170 (9th Cir. 2004); In re Zimmer, 313
24 F.3d 1220, 1227 (9th Cir. 2002). Thus, a Chapter 13 debtor, but
25 not a Chapter 7 debtor, may utilize 11 U.S.C. § 506(a) and (d) to
26 strip off a lien on the debtor's residence, if the lien is
27 completely unsecured based on the value of the residence and the
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1 amount of any senior lien.

2 C. Analysis

3 In its memorandum decision, the bankruptcy court noted that
4 Appellant did not have any tax debts or other pre-petition
5 unsecured priority claims to be paid, that her balance sheet showed
6 that she was solvent and that her monthly income was more than her
7 monthly expenses. Thus, Appellant's plan did not return a
8 meaningful dividend to general unsecured creditors. The court
9 concluded that

10 the totality of the circumstances shows that Tran filed
11 this chapter 13 case solely for purposes of avoiding the
12 second deed of trust under circumstances where such
13 avoidance was not available in her chapter 7, and where
no independent reason exists for her subsequent chapter
13 filing. . . .

14 . . . [T]his case, as a chapter 13 case, is nothing other
15 than an attempt by Tran to unfairly manipulate the
16 Bankruptcy Code to skirt the Supreme Court's holding in
17 Dewsnup, and thus, was not filed in good faith. It is
also clear that this case is of absolutely no benefit to
18 Tran's remaining creditors. It follows that dismissal
pursuant to § 1307(a) is in order, and is the remedy that
would be in the best interest of Tran's creditors and the
estate.

19 June 25, 2010 Decision at 14-15.

20 Appellant's response is based primarily on the fact that some
21 of the good faith factors weigh in her favor. For instance, she
22 points out that she has a good employment history, she has the
23 ability to make her Chapter 13 payments, the plan is expected to
24 last only thirty-six months, her financial statements are accurate,
25 there is no preferential treatment among different classes of
26 creditors, and she has only filed one previous bankruptcy petition.
27 Appellant also argues that she sought Chapter 13 relief in good
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1 faith because the extensive arrearages on her residence could not
2 be cured through a loan modification, although she sought one.
3 Appellant concludes that "attempting to exercise her legal rights
4 to avail herself of the lien-stripping (even if this was the
5 primary purpose of the Chapter 13 case) does not in and of itself
6 authorize dismissal on bad faith grounds."

7 Appellant thus essentially concedes that the main reason she
8 filed her Chapter 13 petition was to strip the second deed of
9 trust. The good faith factors she relies upon pale in light of the
10 fact that she had an improper reason for filing a Chapter 13 case,
11 and no proper reason. She proffers no evidence or argument that
12 were not presented to the bankruptcy court.

13 Appellant filed a Chapter 7 case to discharge her general
14 unsecured debts. Six months after the discharge, she filed this
15 Chapter 13 case to avoid a lien that could not, under Dewsnup, be
16 avoided in her Chapter 7 case. In her Chapter 13 plan, she offered
17 no payments to unsecured creditors, because the only remaining
18 unsecured creditor is the holder of the lien she wishes to avoid.
19 Appellant wishes to partake of the benefits provided under both
20 Chapters 7 and 13 by first discharging all debts in Chapter 7 and
21 then discharging the one remaining unsecured debt in Chapter 13,
22 without providing any benefit to any unsecured creditors.

23 Contrary to Appellant's argument, she is not like other Chapter 13
24 debtors who properly may strip their undersecured liens because
25 they are receiving the benefit of the lien-stripping statute while
26 they are repaying their unsecured creditors. See Warren, 89 B.R.
27 at 92 (certain discharges available in Chapter 13 are not available
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1 in Chapter 7 as incentive for Chapter 13 debtors to perform under
2 Chapter 13 plan; congressional policy supporting Chapter 13 was to
3 enable individuals to develop and perform under a plan for
4 repayment of debts over an extended period).

5 Considering the totality of these circumstances, the Court
6 affirms the bankruptcy court's conclusion that Appellant's Chapter
7 13 case is an attempt unfairly to manipulate the Bankruptcy Code to
8 evade the holding in Dewsnup and, thus, was not filed in good
9 faith.

10 CONCLUSION

11 For the foregoing reasons, the Court affirms the decision and
12 the order of the bankruptcy court.

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14 IT IS SO ORDERED.

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16 Dated: 8/31/2011



CLAUDIA WILKEN
United States District Judge